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No. 95-1230

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BELLSOUTH TELECOMMUNICATIONS, INC., *et al.*,
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENTS AT&T CORP., ALLNET COMMUNICATION SERVICES, INC., AMERICAN NETWORK EXCHANGE, COMPETITIVE TELECOMMUNICATIONS ASSOCIATION, MCI TELECOMMUNICATIONS CORP., SPRINT COMMUNICATIONS COMPANY, L.P., AND TELECOM*USA, INC.

MARK C. ROSENBLUM
PETER H. JACOBY
AT&T Corp.
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-2000

PETER D. KEISLER *
DAVID L. LAWSON
SIDLEY & AUSTIN
1722 Eye Street, NW
Washington, D.C. 20006
(202) 736-8000

May 3, 1996

* Counsel of Record

Attorneys for Respondent AT&T Corp.

Names of Additional Counsel and the Respondents They Represent Appear on the Signature Page

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STATEMENT REQUIRED BY RULE 29.6

Respondent AT&T Corp. owns equity interests in AT&T Capital Corporation and Lucent Technologies, Inc., which are publicly-traded companies. AT&T also owns equity interests in AT&T Credit Corporation and NCR Corporation, which have public debt outstanding.

Respondent Allnet Communication Services, Inc. is a subsidiary of Frontier Corporation, a publicly-traded company. Allnet Communication Services, Inc. has public debt outstanding.

Respondent American Network Exchange is a wholly-owned subsidiary of AMNEX, Inc., which is a publicly-traded company.

Respondent Competitive Telecommunications Association is an industry association and does not have any publicly-traded parents, subsidiaries or affiliates.

Respondent MCI Telecommunications Corporation (MCI) is a wholly-owned subsidiary of MCI Communications Corporation (MCI Corp.), a publicly-traded corporation. Respondent Telecom*USA, Inc. (TUSA), is a wholly-owned subsidiary of MCI Financial Management Corporation, which is a wholly-owned subsidiary of MCI Corp. Neither MCI nor TUSA has any subsidiaries with publicly held debt or equity securities, except that: SHL Systemhouse Inc., a wholly-owned Canadian subsidiary of MCI, has publicly held debt securities; MCI holds an equity interest in IFP Holdings, Inc., the parent of In-Flight Phone Corporation, which has publicly-traded debt securities; and MCI Corp. holds an equity interest in General Communication, Inc., a publicly held corporation.

Respondent Sprint Communications Company, L.P. is a limited partnership, wholly owned by subsidiaries of Sprint Corporation, a publicly-traded corporation. The follow-

ing affiliates of Sprint have issued debt or equity securities to the public:

Carolina Telephone and Telegraph Company
Centel Corporation
Centel Capital Corporation
Central Telephone Company
United Telephone Company of Florida
United Telephone Company of Ohio
United Telephone Company of Pennsylvania

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The decision below raises no issue worthy of this Court's attention. As petitioners must concede, there is no circuit conflict. Instead, in a unanimous decision, the D.C. Circuit merely applied well-settled legal principles in affirming the Federal Communications Commission's ("FCC") unremarkable and sound decision that the customers of those regulated common carriers that exceeded the maximum returns prescribed by the FCC were entitled to damages equal to the unlawful excess in the amounts the customers had been charged. The D.C. Circuit's decision is entirely proper, and, in any event, is of no recur-

ring importance, because the FCC's rate-of-return prescription methodology from which these 1985-90 disputes arose was largely supplanted more than five years ago by a new approach that raises none of the issues cited in the petition.

COUNTERSTATEMENT OF THE CASE

Respondents and their members provide interstate long-distance telecommunications services in competition with each other and with many other long-distance carriers. Long-distance carriers generally do not own or control the local telephone lines that connect to residences or businesses. Instead, they are dependent for the local portions at each end of a long-distance call on local telephone monopolists, including petitioners and their members. Thus, to provide long distance service respondents must purchase from petitioners those local links in the form of originating and terminating "interstate access services." See generally Pet. App. 2a.[1]

Because of their monopoly power, petitioners' interstate access rates are regulated by the FCC, which is empowered under the Communications Act of 1934, 47 U.S.C. § 151, *et seq.*, to ensure that those rates are "just and reasonable." *Id.* § 201. During the 1985-90 period at issue here, petitioners' access rates were subject to a form of rate-of-return regulation that had been initiated by the FCC in 1972. Rather than fix individual rates for each local exchange company access service, the FCC prescribed maximum rates of return that carriers could earn in the aggregate for broad categories of access services over a two-year period "and le[ft] it to the carrier to set its rates at a level designed to yield up to the prescribed rate of return." Pet. App. 3a. The D.C. Cir-

[1] With respect to a long distance call from Cincinnati to Atlanta, for example, the long distance carrier would purchase originating access services from petitioner Cincinnati Bell Telephone Company and terminating access services from petitioner BellSouth Telecommunications, Inc.

cuit in 1975 affirmed the rate-of-return approach as well within the FCC's Communications Act authority. See *Nader* v. *FCC*, 520 F.2d 182 (D.C. Cir. 1975). Over the next two decades, the D.C. Circuit, relying on decisions of this Court, "repeatedly held that a rate-of-return prescription has the force of law and that the Commission may therefore treat a violation of the prescription as a *per se* violation of the requirement of the Communications Act that a common carrier maintain 'just and reasonable' rates, see 47 U.S.C. § 201(b)." Pet. App. 13a.[2] This rate-of-return approach has since been largely replaced by a different "price cap" approach that does not employ rate-of-return prescriptions.

The rate-of-return prescription process afforded petitioners "considerable flexibility" to fashion reasonable rates. See *id.* at 16a. During the relevant periods, the FCC not only allowed each petitioner to determine the initial rates that it expected to yield the prescribed returns (12-12.75 percent, see *id.* at 5a), but also to make "mid-course corrections"—*i.e.*, if its rates appeared destined to yield earnings below or above the authorized return, a local exchange company was free throughout the two-year period to revise its access tariffs up or down to avoid that result. See *id.* at 16a. And to minimize the risk that legitimate miscalculations or last-minute unforeseen events would lead to unlawful overearnings, the FCC also created a "buffer zone" above which a local exchange company's actual earnings could exceed the prescribed return and remain lawful. See *id.* ("by incorporating a buffer into its rate-of-return prescriptions the Commission had allowed each [local exchange carrier] some margin of error").

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[2] *See, e.g., New England Tel. & Tel. Co.* v. *FCC*, 826 F.2d 1101, 1107 (D.C. Cir. 1987) (FCC order setting a maximum rate of return has the "force of a statute" pursuant to Section 205 of the Communications Act, 47 U.S.C. § 205) (quoting *Arizona Grocery* v. *Atchison Ry.*, 284 U.S. 370, 386 (1931)), *cert. denied*, 490 U.S. 1039 (1989).

Petitioners nonetheless substantially exceeded their prescribed rates of return (and the buffer) during the relevant periods. Shortly after petitioners' unlawfully excessive charges were revealed, respondents filed damage complaints with the FCC pursuant to Sections 206-209 of the Communications Act (47 U.S.C. §§ 206-209) which establish carrier liability and a private right of action for such unlawful actions and authorize the FCC to award damages.

Petitioners do not dispute that the FCC prescribed rates of return during the relevant periods, that those prescriptions were valid and carried the force of law, or that, as their own reports to the FCC unambiguously demonstrated, their earnings exceeded the prescribed returns. See Pet. App. 50a ("there are no disputed material facts in the record going to liability"). Rather, citing prior D.C. Circuit decisions, petitioners claimed below, *inter alia*, that (1) the Communications Act grants the FCC no authority to enforce its orders through damage awards; and (2) whatever the FCC's general authority to remedy such violations, rates that yield earnings above the maximum levels that the FCC has determined reasonable are not "unreasonable" under the Act. Relying on the language of the Act and the same D.C. Circuit decisions cited by petitioners, the FCC rejected these (and other related) claims and held that respondents were entitled to damages for petitioners' violations. See Pet. App. 6a.

The D.C. Circuit affirmed the FCC in all relevant respects.[8] Petitioners' strained attempts to rely on the D.C. Circuit's prior decisions in this area left that court "quite frankly mystified." *Id.* at 10a. As the D.C. Circuit explained, the FCC's "chief concern" in issuing rate-of-return prescriptions "is protecting just and reasonable rates." *Id.* at 12a (quoting *New England Tel. & Tel. Co.* v. *FCC*, 826 F.2d 1101, 1106 (D.C. Cir. 1987), *cert.*

[8] The D.C. Circuit reversed the portions of the FCC orders that allowed certain "offsets" to the damages claims. *See* Pet. App. 20-26a.

denied, 490 U.S. 1039 (1989)). The court of appeals reaffirmed that a violation of such a prescription is thus a *per se* violation of the requirement in § 201(b) of the Act that carriers maintain just and reasonable rates (47 U.S.C. § 201(b))—a violation for which Sections 206-209 provide an express private damages remedy. The D.C. Circuit found petitioners' challenge to the FCC's reasonable practice of equating damages with earnings in excess of prescribed rates equally "absurd," recognizing that any such damage calculation "is necessarily but an estimate" (dependent upon such economic principles as the "elasticity of the demand") and that the FCC's approach not only was reasonable but, if anything, "yields a conservative estimate of damages." Pet. App. 16a-17a. Petitioners' subsequent requests for rehearing and rehearing *en banc* were unanimously denied. See *id.* at 20a-23a.

REASONS FOR DENYING THE PETITION

1. The decision below does not conflict with the decisions of this Court or any other court. None of the cases petitioners cite even address the scope of a common carrier's liability in a private damages action for a conceded violation of a rate of return prescription, much less the far narrower "question presented" framed by petitioners (see Pet. i)—as petitioners concede. See *id.* at 12.

Nor does the D.C. Circuit's sound resolution of these ten-year old disputes raise any question of recurring importance, either to petitioners or to other rate-regulated carriers. Petitioners identify no rate-regulated carriers in other industries that are subject to rate-of-return prescriptions under a statutory scheme even remotely similar to the one at issue here. And although rate of return prescriptions once performed a valuable and necessary role in constraining petitioners' exercise of their monopoly power, that approach has largely been replaced in the communications industry as well, because other aspects of rate-of-return regulation gave petitioners incentives to "operate inefficiently," to "manipulate their reported cost allocations," to "pad" rates with monopoly profits, and

"to adopt the most costly, rather than the most efficient, investment strategies because [their] primary means of increasing dollar earnings under rate-of-return constraints [was] to enlarge [their] rate bases." Further Notice of Proposed Rulemaking, *Policy and Rules Concerning Rates for Dominant Carriers*, 3 FCC Rcd. 3195, 3205, 3219 (1988).

Indeed, since 1990, "price cap" regulation—which raises none of the statutory issues upon which petitioners focus here—has been *mandatory* for all of the largest local telephone companies, including petitioner BellSouth and the other Bell Operating Company petitioners. See Second Report and Order, *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd. 6786 (1990).[4] As a result, today more than 90% of interstate access charges (by dollar amount) are paid to local telephone companies that are no longer subject to rate of return prescriptions.

For all of these reasons, petitioners are surely correct that the issue they raise in the petition is "not likely" to be addressed by other courts. See Pet. 12. In these circumstances—a question presented which has been overtaken by events and is now largely academic and upon which there is, in any event, no split among the circuits or conflict with any decision of this Court—there is no conceivable basis for granting the petition.

2. Certiorari should also be denied because the decision below correctly applied settled law. Petitioners contend that although they concededly were not allowed to earn the excess money that they charged their customers, they must now be allowed to keep it. As the court of appeals properly held, that is not the law.

Section 205 of the Communications Act (47 U.S.C. § 205) authorizes the FCC to prescribe rates of return,

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[4] Moreover, even those smaller local monopolies that are not required to switch to price caps are allowed to do so. *See* Order on Reconsideration, *Policy and Rules Concerning Rates for Dominant Carriers*, 6 FCC Rcd. 2637, 2708 (1991); 47 C.F.R. § 61.41(a)(3).

which must "be thereafter followed" by the petitioners. The purpose of such prescriptions is to prevent the petitioners from charging excessive rates, a practice expressly prohibited by Section 201(b) of the Act (47 U.S.C. § 201(b)). Here, the respondent long-distance carriers that were petitioners' customers and that paid the petitioners' excessive rates clearly were injured by petitioners' violations of Sections 201(b) and 205. Accordingly, respondents were properly awarded damages equal to the excess in the amount of charges they paid, pursuant to Sections 206-209 of the Act (47 U.S.C. §§ 206-209)—which create a cause of action, and authorize a monetary remedy, on behalf of those injured by a carrier's statutory violations.

Petitioners raise a host of challenges to that "inevitable conclusion." Pet. App. 13a. Each, however, is in reality an improper collateral assault on the FCC's power to make any rate-of-return prescription at all, for each, if adopted, would have rendered such prescriptions in practice completely unenforceable and hence nullities. Each is also contrary to the Act and judicial precedent.

First, petitioners argue (Pet. 13-14) that in exceeding their rate of return prescriptions they violated only an FCC order, and not the Act, and therefore cannot be the subject of a complaint under Section 206 because Section 206 applies only to violations of "this chapter." See 47 U.S.C. § 206. But petitioners' premise is faulty. Section 205 of the Act requires carriers to "conform to and observe the regulation or practice so prescribed" by the FCC (see 47 U.S.C. § 205), and petitioners violated Section 205 when they charged rates that yielded returns in excess of the prescribed maximum. Petitioners likewise violated Section 201's requirement that their charges be "just and reasonable" by imposing charges that were instead excessive because they overearned. 47 U.S.C. § 201(b). Section 206's damages remedy was properly applied to those violations of "this chapter."

Second, petitioners argue (Pet. 14-17) that charges that yield returns in excess of a prescribed maximum are not themselves necessarily excessive. That argument too is specious. The only reason for the prescription is to protect customers from being charged excessive rates. See *New England Tel. & Tel. Co.* v. *FCC*, 826 F.2d 1101, 1106 (D.C. Cir. 1987) ("[t]he Commission's chief concern in issuing prescriptions is protecting just and reasonable rates"), *cert. denied*, 490 U.S. 1039 (1989); *United States* v. *FCC*, 707 F.2d 610, 612 (D.C. Cir. 1983) ("[t]he return should not be higher than necessary . . . because otherwise ratepayers would pay the excessive prices that regulation is intended to prevent"). This Court and other courts have therefore consistently recognized the obvious: excessive returns mean that the carrier has charged excessive rates. See, *e.g.*, *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 153 (1962) ("The Commission has found that the revised over-all rate schedule should have been calculated on a rate of return of 6⅛% rather than 7%. As a result, the over-all *rate* was *to that extent unlawful* and refunds were due across the board to all customers in the Tennessee Gas system") (emphases added); *Potomac Elec. Power Co.* v. *Public Util. Comm'n*, 158 F.2d 521, 523 (D.C. Cir. 1946) ("Since the company's returns have greatly exceeded a fair percentage of return upon a fair base, it follows as a matter of law that the rates charged for electricity, instead of being 'just and reasonable' as the law requires them to be, have been excessive"), *cert. denied*, 331 U.S. 816 (1947).[5]

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[5] Petitioners' reliance (Pet. 14-16) on *Dayton-Goose Creek Ry.* v. *United States*, 263 U.S. 456 (1924), is misplaced. In *Dayton-Goose*, the agency had itself prescribed the rates that the carriers then charged, thus determining in advance that those rates were just and reasonable. *Dayton-Goose*, 263 U.S. at 476. In any event, the Court in *Dayton-Goose* specifically rejected the position petitioners argue here. *See id.* at 483 ("[i]f the profit is fair, the sum of the rates is so. If the profit is excessive, the sum of the rates is so").

FPC v. *Natural Gas Pipeline Co.*, 315 U.S. 575 (1942), likewise provides no support for petitioners' argument. There, the agency

Petitioners argue (Pet. 8) that the FCC's focus should have been on whether they made a good faith effort to charge rates that complied with the prescription, rather than whether they actually succeeded in doing so. But customers paid the same excessive rate regardless of whether the excessive charge was deliberate or inadvertent; it is baseless to suggest that they were charged an unlawful rate in one instance but not the other. "Certainly carriers cannot intentionally try to violate an outstanding prescription, but that does not mean that they may achieve through inadvertence what they are forbidden from doing by design." *New England Tel. & Tel. Co.*, 826 F.2d at 1106.[6]

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determined that the regulated company's return had "exceeded the fair return" and that its rates were therefore "unjust, unreasonable, and excessive," and the Court affirmed its order. *Id.* at 580. No suit for damages was at issue in that case, so the focus of the agency's decision was its ordering of a prospective reduction in rates.

[6] Petitioners' related suggestion (Pet. 17) that the decision of the court of appeals was contrary to its earlier decision in *Virgin Islands Tel. Corp.* v. *FCC*, 989 F.2d 1231 (D.C. Cir. 1993), is also unavailing. Even if an intra-circuit conflict were relevant to certworthiness, there is no such conflict here. Unlike this case, in which petitioners' violations of the FCC's prescriptions are undisputed, the court in *Virgin Islands* held that the carrier there had *not* violated the FCC's prescribed rate of return at all, because that prescription (like those at issue here) applied to the return over a two-year period and that carrier (unlike petitioners here) had purportedly "overearned" only for a six-month period. *Id.* at 1238. Moreover, *Virgin Islands* was a refund action under Section 204 of the Communications Act, not a damages action under Sections 206-209. As the court of appeals explained (Pet. App. 13a-14a), the reasonableness of a carrier's inadvertently erroneous projections in setting rates could be relevant to the FCC's decision in a refund action because the Act makes refund decisions a matter of FCC discretion (*see* 47 U.S.C. § 204). Such considerations are not relevant to damages actions like those at issue here, however, where the statute *requires* the FCC to award damages to any injured party. *See* 47 U.S.C. § 206. That there is no conflict is further shown by the fact that the same two judges that were in the majority in *Virgin Islands*—Chief Judge Edwards and Judge

In any event, no such equitable claim of "innocent error," even if relevant (as it is not), was supported in these cases. As the FCC explained (Pet. App. 106a), even if a carrier initially misjudged the returns its rates would produce, it had full possession of its revenue data and had every opportunity "to make corrections to its tariff" in mid-course in order to adjust downward any rates that were overearning, and thus to ensure an overall return that would comply with the FCC's prescriptions. See *id.* at 16a. Petitioners cite no evidence even attempting to justify their failure to make such midcourse corrections or explaining how excessive earnings could have been "inadvertent" in light of those opportunities. Consequently, this record presents no basis for resolving the legal issue petitioners now seek to raise.[7]

Third, petitioners argue that the award of damages was improper because the FCC was purportedly required to calculate damages by first identifying what "the" just and

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Ginsburg—were on the panel that unanimously affirmed the FCC in this case.

[7] Petitioners likewise claim (Pet. 20) that it is unfair to require them to pay damages to customers when they have violated a rate of return prescription, because levels of earnings are purportedly "beyond their control." That claim is similarly groundless. In addition to giving petitioners a two-year period in which to achieve the prescribed rate of return and the freedom to make mid-course corrections, the FCC created additional play in the joints by establishing a "buffer zone" above the prescribed rate of return, and carriers that exceeded the prescription but fell within the buffer zone were not made liable for any damages. As the court of appeals explained (Pet. App. 16a), "[t]hese provisions afforded each LEC [local exchange carrier] considerable flexibility to use the market information available to it—the LEC presumably knew at least approximately what its revenues and costs were—to fashion a rate that was 'reasonable,' *i.e.*, would not result in a return above the maximum allowed." For the LECs who failed to make proper mid-course corrections despite two years in which to do so, and whose two-year returns then exceeded not only the prescribed maximum but the prescribed-maximum-plus-the-buffer, the suggestion that their liability was somehow "beyond their control" is baseless.

reasonable rate would have been, which it did not do. Pet. 17-19. The court of appeals properly characterized this argument as "absurd." Pet. App. 16a. There is no *single* set of potential just and reasonable rates, for there are any number of combinations of rates for different services, at different time periods within the two years, that petitioners could have charged in order to comply with the prescription. And if petitioners could not or did not calculate what those rates should have been, it is indeed "absurd" to suggest that the complainants, with no comparable access to the pertinent revenue and demand data, should have been required to do so as a precondition to recovering for their injuries.

This Court has held that where rates are shown to have been excessive, "the measure of damages is the amount of the excess exacted" (see *Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 235 (1925)), and that was the standard applied by the FCC. It calculated damages by taking the amount each customer paid each petitioner and reducing that amount by the percentage by which the petitioner exceeded the prescribed rate of return. See Pet. App. 15a, 90a. As the court of appeals recognized, this method *understated* actual damages. Because demand for a service generally increases as the price is reduced, one would normally have to reduce rates by more than 10% in order to reduce the carrier's revenues by 10%. See *id.* at 16a-17a. For the sake of simplicity, the FCC awarded only the understated amount as damages—in this example, the 10% reduction—and the complainants waived any claim for more.[8]

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[8] Petitioners make the extraordinary assertion that even this method—which benefited them by reducing their damages—was improper because in some hypothetical cases reducing rates will increase the overall return. *See* Pet. 19. If that were the case here, however, complainants would be entitled to even *greater* damages, because it would mean that petitioners had been charging rates that exceeded even the *monopoly* price. If price and return are plotted on a graph (with price on the horizontal axis and return on the

Fourth, it is not the case (see Pet. 22) that the petitioners "underearned" in services for which they earned less than the prescribed maximum and that it was unfair not to average these asserted "underearnings" with their overearnings. Applying the term "underearnings," as petitioners do here, to instances in which a carrier merely earns less than the maximum allowed is a patent misnomer. A prescribed rate of return is a maximum allowable return, not a guaranteed minimum return. Petitioners had the right to attempt to earn the maximum, but for services in which they charged less than they might have, they have no right retroactively to recover from customers the difference between what they could have charged and what they actually charged. That was the holding of this Court in *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 152-53 (1962):

> a rate for one class or zone of customers may be found by the Commission to be too low, but the company cannot recoup its losses by making retroactive the higher rate subsequently allowed; on the other hand, when another class or zone of customers is found to be subjected to excessive rates and a lower rate is ordered, the company must make refunds to them. *The company's losses in the first instance do not justify its illegal gain in the latter.* Such situations are entirely consistent with the policy of the Act and, we are told, occur with frequency. *The company having initially filed the rates and either collected an il-*

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vertical axis), they will generally produce a rough bell-shaped curve. At a price of zero, the return is obviously zero; as the price is then increased, the return increases, but only until the profit-maximizing monopoly rate is reached; thereafter, increases in prices produce decreases in return, because they depress demand for the service by more than the amount for which the increase in price will compensate. If petitioners are hypothesizing that their prices were so high that they could have reduced them and still increased their overall return, then those rates were necessarily on the *far* side of the bell curve (*i.e.*, higher even than the monopoly rates at which their profits would have been maximized) and thus grossly excessive.

> *legal return or failed to collect a sufficient one must, under the theory of the Act, shoulder the hazards incident to its action including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate.*

(emphases added).[9] The court of appeals further held that nearly a century of agency decisions precludes such "offsets." Pet. App. 20a-26a.

Finally, petitioners' contention (Pet. 22) that requiring them to pay damages denied them the "rate stability" to which they were entitled is spurious. Under the Communications Act, when the FCC prescribes rates of return, carriers know that they must charge rates that produce returns within that prescribed maximum. They are given the opportunities to make mid-course corrections, and they know that any excess at the end of the two-year period will render them liable for that excess. There is nothing unpredictable or unstable about that system. In any event, petitioners have no entitlement to stable, excessive rates.

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[9] Petitioners' suggestion (Pet. 22) that the holding of *Tennessee Gas* means that their profits will be "systematically depressed below the authorized rate of return" is simply wrong. The FCC did not award damages equal to the amount of the excess over the prescribed maximum; it awarded damages equal to the amount of the excess over the prescribed-maximum-*plus-the-buffer*. Thus, even if their claim on this point could support ignoring the holding of *Tennessee Gas* (as it could not), there is no reason to believe—and petitioners presented no evidence below—that any such systematic effect was present here. To the contrary, the FCC expressly found that no such effect occurred in these cases. *See* Pet. App. 62a-63a.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

ROY L. MORRIS
1990 M Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 293-0593
Attorney for Respondent Allnet Communication Services, Inc.

GENEVIEVE MORELLI
Vice President and General Counsel
Competitive Telecommunications Association
1140 Connecticut Avenue, N.W.
Suite 220
Washington, D.C. 20036
(202) 296-6650

ROBERT J. AAMOTH
REED SMITH SHAW & MCCLAY
1301 K Street, N.W.
Suite 1100 East Tower
Washington, D.C. 20005
(202) 414-9210
Attorneys for Respondents Competitive Telecommunications Association and American Network Exchange

PETER D. KEISLER *
DAVID L. LAWSON
SIDLEY & AUSTIN
1722 Eye Street, NW
Washington, D.C. 20006
(202) 736-8000

MARK C. ROSENBLUM
PETER H. JACOBY
AT&T Corp.
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-2000
Attorneys for Respondent AT&T Corp.

FRANK W. KROGH
DONALD J. ELARDO
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 887-2372
*Attorneys for Respondents MCI Telecommunications Corporation and Telecom*USA, Inc.*

MICHAEL B. FINGERHUT
1850 M Street, N.W.
11th Floor
Washington, D.C. 20036
(202) 857-1030
Attorney for Respondent Sprint Communications Company, L.P.

* Counsel of Record